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Issue Date: 06 August 2004

Case No. 2003-LHC-02591

OWCP No. 5-78363

In the Matter of

WILLIE L. MATTHEWS,
Claimant
v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY,
Self-Insured Employer

Appearances:
Matthew H. Kraft, Esq., for Claimant
Benjamin M. Mason, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for permanent partial disability from an injury alleged to have been suffered by Claimant, Willie L. Matthews, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he injured his back while working as a rigger for Employer.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on March 24, 2004. (TR.).[1] Claimant submitted eight exhibits, identified as CX 1 through CX 8, which were admitted without objection. (TR. at 11). Employer submitted six exhibits, EX 1 through EX 6, which were admitted without objection. (TR. at 12). The parties also submitted one joint exhibit, JX 1, which was admitted. (TR. at 9). The record was held open for until May 24, 2004, for the submission of post-hearing briefs. (TR. at 57). Both parties have submitted post-hearing briefs.

[1] EX - Employer's exhibit; CX - Claimant's exhibit; and TR - Transcript.

The record was also held open for fifteen days for the submission of evidence by Claimant as to whether he sought a change in the District Director's compensation order from temporary partial disability compensation to permanent partial disability compensation. (TR. at 56-57). On April 6, 2004, Claimant submitted proposed Claimant's Exhibit 9, which he states are records from the Office of Workers' Compensation Programs.[2] Employer has not objected to the admission of this exhibit; to be sure, Employer includes this exhibit in his list recounting the exhibits submitted by the parties. (Employer's Brief, at 8). As Employer has no objection to the exhibit, Claimant's Exhibit 9 is hereby admitted.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether the September 29, 1997, order issued by the District Director has been terminated;

2. Whether the agreement made by the parties to convert Claimant's disability payments from temporary partial to permanent partial disability compensation, and their actions subsequent to that agreement, constitute a proper request for modification under Section 22 of the Act;

3. If the parties' actions constitute a proper request for modification, whether Claimant no longer has a loss of wage-earning capacity due to a loss of overtime such that the order should be modified to end the permanent partial disability payments as of January 1, 2002;

4. If Claimant is entitled to permanent partial disability after January 1, 2002, the appropriate compensation rate.

STIPULATIONS

At the hearing, Claimant and Employer stipulated, and I find, that:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. An Employer-employee relationship existed at all relevant times;

3. The Claimant sustained an injury to his back arising out of and in the course of his employment on November 20, 1990;

[2] Claimant also submitted this exhibit as an attachment to his post-hearing brief.

4. Written notice of the injury was not given within thirty (30) days but the Employer had knowledge of the injury and has not been prejudiced by lack of such written notice;

5. A timely claim for compensation was filed by the employee;

6. The Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. The Claimant's average weekly wage at the time of the injury was $468.24, which results in a total disability compensation rate of $312.16;

8. The Claimant was paid disability benefits in accordance with the prior Orders of October 31, 1994 and September 29, 1997 in this matter;

9. The Claimant reached maximum medical improvement on August 15, 1998; and

10. The parties agree to and incorporate the prior findings and stipulations included in the prior orders in this matter of October 31, 1994 and September 29, 1997.

(JX 1). Additionally, the parties stipulated at the hearing that Claimant is entitled to an award of permanent partial disability from August 15, 1998, to December 31, 2001, at the rate of $21.06 per week, which is the same rate at which he was receiving temporary partial disability previously. (TR. at 9-10). The parties also stipulated that Claimant was unable to return to his pre-injury employment as a rigger following his back injury. (TR. at 55).

DISCUSSION OF LAW AND FACTS

This matter is before the court in the following posture. The parties agree that the first order in this case was issued by the District Director on October 31, 1994. (JX 1). The order was entered "[p]ursuant to agreement and stipulation by and between the interested parties," and therein, the District Director found that Claimant sustained an injury to his back while performing service as a rigger for Employer. (CX 3b). The order provided for an award of compensation to Claimant of temporary total disability for the following time periods: November 21, 1990, to March 17, 1991; July 15, 1991, to October 6, 1991; and from October 12, 1991, to June 20, 1993, inclusive. The order also provided for compromised[3] temporary total disability for various periods of time from June 21, 1993, to August 13, 1993, inclusive. (CX 3c-d).

[3] The District Director's order does not explain the use of the word "compromise." However, it is noted that if the Claimant and Employer stipulated to a compromise that results in a waiver of any compensation which might have been due the Claimant, such would be in violation of §915(b) of the Act and would be void. In any event the "compromised" compensation was for $900.00 in 1993. As such, it does not affect the outcome of this case.

The parties also agree that another order for temporary partial disability compensation was issued on September 29, 1997, by the District Director. (CX 4). The 1997 order incorporated by reference the October 31, 1994, order and was also entered "pursuant to agreement and stipulation by and between the interested parties." (CX 4b). The order provided for an award of compensation to Claimant as follows: temporary total disability from November 21, 1990, to March 17, 1991, from July 15, 1991, to October 6, 1991, from October 12, 1991, to June 20, 1993, and from November 1, 1995, to April 28, 1996. The order also provided for temporary partial disability compensation from August 14, 1993, to October 31, 1995; from May 17, 1996, to July 15, 1996; from July 21, 1996, to January 12, 1997. Additionally, the order awarded a compromised period of disability between June 21, 1993, to August 13, 1993, of 2.8831368 weeks. Finally, the order directed the Employer to continue to pay temporary partial disability benefits at a rate of $21.06 per week from January 13, 1996, to continuing "within the limitation of the Act or until further order of the District Director." (CX 4c).

At or near the end of the five-year period during which temporary partial disability benefits were being paid, the parties agreed, without a subsequent order, to change the nature of the payments Claimant was receiving to permanent partial disability compensation payments. (TR. at 5). The record contains a letter from Theresa Magyar, Claims Examiner for the U.S. Department of Labor (District Director's office), to Mr. Woodrow Holmes, Case Manager for Employer, dated July 31, 1998. That letter states:

> A review of the above captioned case reflects that effective August 14, 1998 the claimant will have been receiving payments of compensation for temporary partial disability at the rate of $21.05 per week for the maximum five (5) years mandated by §908(e) of the Longshore and Harbor Workers' Compensation Act.
>
> Please advise the employer's position regarding conversion of payments to permanent partial disability for a wage earning capacity loss.

(CX 5).

Since that time, Employer states that it has continued to voluntarily make such payments. (TR. at 5). Claimant has submitted into evidence a form LS-208, "Notice of Final Payment or Suspension of Compensation Payment," which is dated May 14, 1999. (CX 6a). The LS-208 notes that the last payment was made on May 9, 1999. (CX 6a). In the space labeled "State reason or reasons for termination or suspension of payments," the following is written: "Change payments from temp partial to perm partial." (CX 6a). The attached list of disability payments provides the following information:

Type of Disability	From (Mo., day, yr)	To (Mo., day, yr., incl.)	Amount Paid Per Week	Number of Weeks Paid	Total
Temp Total	11/21/90	03/17/91	312.16	16 5/7	5,217.53
Temp Total	07/15/91	10/06/91	312.16	12	3,745.92
Temp Total	10/12/91	06/20/93	312.16	88 2/7	27,559.27
Compromised Period	06/21/93	08/13/93	312.16	2.8831368	900.00

Type of Disability	From (Mo., day, yr)	To (Mo., day, yr., incl.)	Amount Paid Per Week	Number of Weeks Paid	Total
Temp Partial	08/14/93	10/31/95	21.06	115 4/7	2,433.93
Temp Total	11/01/95	04/28/96	312.16	25 5/7	8,026.97
Temp Partial	5/17/96	7/15/96	21.06	8 4/7	180.51
Temp Partial	07/21/96	08/14/98	21.06	107 6/7	2,271.47
Perm Partial N-Sched.	08/15/98	05/09/99	21.06	38 2/7	806.30
Perm Partial N-Sched.	05/10/99	continuing	21.06		
				TOTAL	**$51,141.90**

(CX 6b).

Claimant also submits a form LS-206, "Payment of Compensation Without Award," dated May 13, 1999. (CX 9a). This form states that Claimant has loss of average weekly wage of $31.59, which results in a compensation rate of $21.06. The form also states that compensation, in the form of permanent partial disability as a result of loss of wage earning capacity, will be paid from August 15, 1998, with the first payment being on May 9, 1999, and notes "(Changed from temporary partial)." (CX 9a).

The event that placed the instant matter before the undersigned Administrative Law Judge was a form LS-18 filed by Employer on June 17, 2003. The LS-18 states that the issue is "Section 22 modification, no loss of wage earning capacity due to overtime."

The Status of the September 29, 1997, Order Issued by the District Director

Employer offers alternative theories as to why the 1997 order should be considered terminated. First, Employer argues that the order should be terminated based upon Claimant reaching maximum medical improvement on August 15, 1998, a fact to which the parties have stipulated. Employer argues that, because Claimant reached maximum medical improvement, his disability is no longer considered temporary, but rather, is considered permanent in nature. (Employer's Brief, at 10 (citing *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 858 (4th Cir. 1979))). Therefore, the order awarding *temporary* disability must necessarily terminate as of August 14, 1998, since Claimant was no longer considered *temporarily* disabled. Employer further contends that this position is bolstered by the fact that the parties have stipulated and agreed that Claimant is entitled to an award of *permanent partial* disability from August 15, 1998, through December 31, 2001, inclusive, at a rate of $21.06 per week and have asked this court to enter an order awarding the same. Therefore, based upon the case law, and facts and stipulations of the parties in this case, the September 29, 1997, order must be terminated as of August 14, 1998. (Employer's Brief, at 9-10) (emphasis added).

Employer's second argument is based upon the five-year limitation set forth in §8(e) of the Act. Employer asserts that the 1997 order called for payment of temporary partial disability payments for a total of 149 2/7 weeks prior to January 13, 1997. As a result, Employer argues, Claimant would thereafter be entitled to no more than 110 5/7 weeks of temporary partial

disability payments. According to Employer, 110 5/7 weeks from January 13, 1997, ends approximately February 26, 1999, meaning that Claimant would be entitled to no further temporary partial disability payments after that date. Employer contends that this would necessarily terminate the District Director's order as of February 26, 1999, regardless of the fact that Claimant reached maximum medical improvement on August 15, 1998. (Employer's Brief, at 11).

Claimant's arguments center on the agreement between the parties to continue Claimant's compensation as permanent partial disability and his assertions that the parties actions in the interim served to keep alive the 1997 order. Claimant argues that he made an original timely claim for benefits, and the parties have so stipulated. Claimant further asserts that a claim for permanent partial disability benefits based on a loss of overtime was timely made by correspondence from Claimant's counsel to OWCP on January 23, 1995. (Claimant's Brief, at 12 fn.10 (citing CX 9d-e)). Further, he argues that he never waived the issue of permanency nor his right to permanent partial disability benefits. Therefore, Claimant argues that he made a timely claim for permanent partial disability benefits either by an original claim and the January, 1995, correspondence, or by a request for modification under Section 22 of the Act by virtue of the January, 1995 claim, and therefore, the September 29, 1997, order did not automatically terminate. (Claimant's Brief, at 12-13 fn. 10).

Claimant also argues that the agreement made by the parties that Employer would convert the payments to permanent partial disability was memorialized in the LS-208 and LS-206 filed with OWCP within one year of the August 14, 1998, date (the last day on which the parties agree Claimant was entitled to temporary partial disability). Therefore, the filing of these forms constitutes a request for modification of the September 29, 1997, order and a claim for permanent partial disability benefits. (Claimant's Brief, at 13 fn.10). Along those lines, Claimant asserts that there is no timeliness issue surrounding the current proceedings because a proper claim was filed within one year of the date of the last payment of compensation benefits, since Employer has continued to pay permanent partial disability compensation per the agreement with Claimant. (Claimant's Brief, at 13 fn.10).

The Fourth Circuit endorsed the strict language of Section 8(e) of the Act in a recent case. In *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513 (4th Cir. 2000), the court discussed the fact that Section 8(e) permits temporary partial disability awards to continue for up to five years. The court also injected the caveat that "A temporary award may terminate sooner than five years upon a showing that the condition giving rise to the disability has reached its 'maximum medical improvement'; at that point, if the 'improvement' is less than full recovery, the claimant may receive a permanent disability award." *Id*. at 516 (citing *Gilchrist v. Newport News Shipbuilding & Dry Dock Co*., 135 F.3d 915, 917 (4th Cir. 1998)). In the latter case, the court states that if an employer believes that an injured claimant regains his pre-injury earning capacity or otherwise reaches maximum medical improvement prior to the expiration of the five-year period, the proper course of action for the employer is to move for modification of the initial award under Section 22 of the Act. *Id*.

Momentarily setting aside the Court's statements regarding modification, one point is clear: a temporary award is only valid for the lesser of five years or until an injured claimant

reaches maximum medical improvement. The parties have stipulated in the instant matter (and previously agreed between them) that Claimant reached maximum medical improvement on August 15, 1998. This event was triggered by a letter from Claims Examiner Theresa Magyar informing the parties that the statutory five-year period for temporary partial disability payments was set to expire and inquiring as to whether Employer desired to convert the payments to permanent partial disability. Therefore, I find that the order entered on September 29, 1997, which awarded Claimant temporary partial disability "from January 13, 1996, to continuing 'within the limitation of the Act or until further order of the District Director'" necessarily expired at the point in time, August 15, 1998, that Claimant reached maximum medical improvement.

Had Claimant not reached maximum medical improvement, Employer's alternate argument, which is equally valid, would have been the appropriate argument for these circumstances. By my calculations (which are very close to those by Employer), as of January 13, 1996, Claimant was eligible to receive temporary partial disability for an additional 111 1/7 weeks. Therefore, Claimant could have received temporary partial disability until approximately February 23, 1999.

Conversion of the Disability Payments to Permanent Partial Disability Compensation

The discussion must now turn to the parties' actions subsequent to their agreement to convert Claimant's payments from temporary partial to permanent partial disability compensation. These actions include the parties' agreement to convert the payments; Employer's payment, on a continuing basis, of permanent partial disability compensation; the filing of the form LS-206, "Payment of Compensation Without Award," dated May 13, 1999; and the filing of the form LS-208, "Notice of Final Payment or Suspension of Compensation Payment," which is dated May 14, 1999.

Although Employer filed the LS-206 and LS-208 forms, as well as the LS-18 seeking modification, which places the instant matter before me, there is no order to modify. As I found above, the September 29, 1997, order expired at the point in time when Claimant reached maximum medical improvement (August 15, 1998). Although the District Director, OWCP, through a claims examiner inquired as to whether the Employer wished to convert the temporary compensation to permanent compensation, to which the Employer agree, an order to that effect was never issued by the District Director.

Therefore, since that time, Employer has been making voluntary permanent partial disability compensation payments. Employer now seeks to end its *voluntary* compensation payments, asserting that Claimant no longer has a loss of wage-earning capacity due to loss of overtime, whereas Claimant seeks entry of an order to continue those payments, taking the opposite position. Because the payments were voluntary in nature and there is no order to modify, Employer did not need to file an LS-18 requesting modification. This detail is significant because, as the party opposing the termination of the voluntarily payments, Claimant is essentially making a claim and seeking the entry of an order for permanent partial disability benefits from Employer. Because Claimant is the party asserting that his current wages are not

representative of his actual wage-earning capacity, he therefore has the burden of proving that he is entitled to a loss of wage-earning capacity due to a loss of overtime. *See Grage v. J. M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J. M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180 (9th Cir. 1990).

Accordingly, the evidence must be considered in light of the Claimant's claim for permanent partial disability compensation, rather than as a request for modification by the Employer.

Claimant's Testimony

Claimant testified at the hearing that he has worked for Employer since 1980. He was hired as a rigger and was working in that position, removing metal scraps from some staging equipment under an elevator, at the time of his back injury in November, 1990. As a rigger, Claimant was required to assist other trades and perform various tasks including ones involving scrap metal or moving equipment. Physically, Claimant was required to lift objects that weighed anywhere from 50 to 75 pounds; climb ladders; squat; crawl; and kneel. (TR. at 13-15). The last time Claimant worked as a rigger was at the time of his injury. (TR. at 29). Claimant did testify that he would have continued to work as a rigger had his injury not occurred. (TR. at 37).

When Claimant injured his back, he was treated by Dr. Hardy, who performed surgery on his back twice. (TR. at 15). Claimant's first surgery was in 1990, and his second surgery was in 1991. (TR. at 22). Following the surgery, Claimant returned to work in the shipyard. He testified that he was assigned various jobs after his return. His first assignment involved "staging equipment," which Claimant described as "taking [the equipment] apart and greasing them or putting them back together." (TR. at 16). Claimant also worked as a toolkeeper, which involved tracking the numbers from tools and issuing the tools to other riggers for their use. In reference to Claimant's Exhibit 2A, Claimant confirmed that he was transferred to the toolkeeper position effective September 27, 1999. (TR. at 16). According to Claimant, the position as a toolkeeper made him "separate from the majority of the riggers," as he was performing work only in the toolroom; he did not, in that position, perform any rigging work. (TR. at 22-23).

Claimant was later assigned to the hose shop and was charged with the task of fixing air lines and air hoses. Claimant testified that he remained in this position for approximately one year, until approximately the end of 2002 or beginning of 2003. (TR. at 17). Claimant testified that the only other change in his position arose when he was offered to attend "forklift school" approximately five months prior to the hearing. This occurred after Claimant inquired with his foreman as to whether he could become qualified to drive a forklift. Claimant received his forklift operator certification, and at the time of the hearing had been working in a forklift position for three to four months. He also testified that he performs hose repair occasionally, when there is no forklift work available. (TR. at 17-18, 30, 33, 37).

Claimant testified that he understood that he was under permanent restrictions, issued by Dr. Reid, to perform only sedentary work. To this extent, Claimant opined that his current job is lighter than his pre-injury full duty job. He also affirmatively stated that he could not perform

his pre-injury employment under the sedentary restrictions issued by Dr. Reid. (TR. at 18). He stated that driving the forklift was within his permanent restrictions, and performing that job has not caused him any problems with his lower back. According to Claimant, there is nothing in his restrictions that would prevent him from working overtime. (TR. at 35).

Claimant testified that he worked overtime prior to his injury and that he worked overtime when it was made available to him. Claimant also stated that there was a period of time following his injury when he worked little if any overtime. (TR. at 18, 29). He further stated that in 2002, he began to work some overtime; this first occurred while he was working as a toolkeeper. He was offered overtime work on "a few Saturdays," and when the overtime was made available to him, he worked it. (TR. at 19, 30). Claimant confirmed that he worked some overtime in 2002 and 2003 and continues to work overtime when it is made available to him. (TR. at 19). Claimant testified that, if his overtime record shows that he worked 122.4 hours of overtime in 2002, and 100 hours of overtime in 2003, that time would have been worked in the toolroom. (TR. at 33). According to Claimant, all of this overtime was within his restrictions. (TR. at 35). When Claimant worked in the hose shop, he stated that he did not work overtime because it was not available to him. (TR. at 30, 34).

Claimant has worked overtime in the forklift department. (TR. at 30). As of the time of the hearing, Claimant had worked approximately 23 hours of overtime in 2004, all of which were in the forklift driver position. (TR. at 34-35). Claimant testified that he had most recently worked overtime on the Saturday before the hearing. He worked eight hours that day driving the forklift; he performed this task for a crew different than his usual crew. Claimant confirmed that working overtime with another crew was not unusual. (TR. at 31, 34). The crew on which Claimant serves is supervised by a Mr. George Carson; this crew is designated for the hose repair shop. It contains no riggers, and no one on this crew works overtime unless they are requested to work with another crew. (TR. at 32). Claimant is the only forklift driver on Mr. Carson's crew. (TR. at 36). Claimant further testified that his general foreman is Mr. Jetty Spicer. (TR. at 37).

Claimant elaborated that riggers work throughout the shipyard, and as far as he knew, all of the riggers were in the X-36 department. Claimant did not know how many riggers total were employed at the shipyard. (TR. at 28). Claimant testified that "as far as he knew," overtime had generally been steadily available to riggers at the shipyard. (TR. at 22). However, he also stated that some riggers worked in areas where more overtime was available. (TR. at 28-29).

Claimant was asked whether he knew a man by the name of Charles Overton. Claimant knows Mr. Overton and stated that he was a rigger who was hired about the same time he was. (TR. at 19-20). Claimant occasionally worked with Mr. Overton around the time that he (the Claimant) was injured. Claimant considers Mr. Overton to be similar to him in terms of training and experience. (TR. at 20). However, while Claimant worked "around" Mr. Overton, Claimant never worked on the same crew with him. (TR. at 24).

Claimant also testified to knowing a man named James Elam, another rigger, who was also hired in 1980. (TR. at 20-21). Claimant occasionally worked with Mr. Elam, who performed the same type of work as Claimant. Claimant also considers Mr. Elam to be similar to him in terms of training and experience. (TR. at 21). Claimant stated that he did work with Mr.

Elam approximately two to three years prior to his back injury, but that they did not work together at the time of Claimant's injury. (TR. at 24).

Claimant did not know anyone by the names of Tilden Purdie, Algenon Purdie, or Mack Lassiter, nor did he recall working with any of these individuals. (TR. at 21-22, 25-26). However, he did know of an individual named Henry Novell, but stated that he only "kn[e]w of him." He believed that he worked as a rigger, and at one time was a cleanup person. He was unsure as to when Mr. Novell changed positions. (TR. at 21-22, 25). Claimant never worked with this individual but has "been around him." (TR. at 25). Claimant knew only that Mr. Novell was a rigger. (TR. at 22). Claimant also knew of an individual named Ronnie Batten but did not know when Mr. Batten was hired. He stated that Mr. Batten worked in ship repair, but did not know specifically what job he performed. (TR. at 22, 26).

Claimant also testified to knowing a person named Zolly Outlaw. Claimant stated that he last knew of Mr. Outlaw approximately two years prior, and at that time, Mr. Outlaw was a rigger. Claimant did not know if Mr. Outlaw was still a rigger, but testified that he "believe[d] he works in a building called 133 where they repair staging and staging wire." (TR. at 23-24).

Testimony of Jetty Spicer

Jetty Spicer has worked for Employer for 34 years. He entered the apprentice school as a shipwright in 1970, became a foreman in 1974, and in 1990, became the general foreman in charge of rigging and ship repair. He was moved back to foreman status in 1994 and was re-promoted to general foreman in 2000. (TR. at 41-42). At the time he was re-promoted in 2000, he was sent to work on the USS Enterprise in Portsmouth, Virginia, until mid-2003, when he returned to Employer's shipyard in Newport News, Virginia. When he returned, he was placed in charge of new carrier construction. Mr. Spicer has six foremen that work under his leadership, including Claimant's foreman, Mr. George Carson. (TR. at 42).

Mr. Spicer supervised Claimant through the mid-1980s, and Claimant began working on Mr. Carson's crew at approximately the same time as he (Mr. Spicer) returned to the Newport News shipyard. (TR. at 42-43). According to Mr. Spicer, Claimant made his foreman aware that he was interested in becoming a forklift driver. Mr. Spicer knew that driving a forklift was within Claimant's work restrictions, believed it would be a "good job for him," and began the process to get Claimant qualified for that position. To Mr. Spicer's recollection, Claimant began driving a forklift in September or October, 2003. (TR. at 43, 45). Claimant has been working overtime as a forklift driver. Mr. Spicer knew of no restrictions upon Claimant that would prevent him from working more than eight hours per day or that would prevent him from working overtime. (TR. at 45, 50).

Mr. Spicer explained the process of how overtime work was assigned. According to Mr. Spicer, he received service orders from the various trades as to what type of work and how many people they would be requiring on the weekends. Mr. Spicer stated that he supervises 60 to 70 people, and that 10 of those individuals usually work on the weekends. On a typical weekend, one or two forklift drivers are needed; approximately six forklift drivers work in Mr. Spicer's

crew. After receiving the service orders, Mr. Spicer confers with the foremen below him, who designate people to work overtime. The foremen try to divide the overtime evenly among the workers, according to Mr. Spicer. (TR. at 44, 50). Mr. Spicer confirmed that overtime work to riggers is assigned in the same manner as other overtime work. (TR. at 54).

Mr. Spicer knows of a man named Charles Overton, but Mr. Overton does not work in his area nor has he since Mr. Spicer returned in 2003. (TR. at 46). Mr. Spicer does know James Elam, who works for one of Mr. Spicer's foremen. According to Mr. Spicer, Mr. Elam performs non-nuclear rigging work, such as installing pipe or removing scrap. He would consider Mr. Elam to be comparable to Claimant in terms of skill. Mr. Spicer also testified that if Mr. Elam worked any overtime while under him in 2003, he was not performing rigging work. (TR. at 47, 53). Mr. Spicer also knows Henry Novell, although Mr. Novell does not work under him. Mr. Spicer stated that Mr. Novell was a cleaner until approximately 1996, when he was trained as a rigger. (TR. at 47, 51). Mr. Novell works as a rigger in ship repair. (TR. at 48).

Mr. Spicer testified that Ronnie Batten was a nuclear rigger that worked with him on the USS Enterprise. He also stated that Mack Lassiter worked for him in the 1980s and was now working as a non-nuclear rigger on a CVN overhaul on the Eisenhower ship. He related that Zolly Outlaw was a ship-rigging tester who worked for him in the 1980s. According to Mr. Spicer, Mr. Outlaw was currently under restrictions and working in the main toolroom. Mr. Spicer recognized the names Algenon Purdie and Tilden Purdie but knew nothing else about these individuals. (TR. at 48, 52).

Mr. Spicer elaborated on the difference between nuclear and non-nuclear riggers, as well as the difference in the work that takes place in overhaul and new ship construction. According to Mr. Spicer, those individuals who work in the overhaul areas work more overtime because it is a seven-day-a-week, 24-hour per day operation. New ship construction, on the other hand, is typically 40 hours per week, with some Saturday work. He also stated the nuclear riggers were "probably required to work more overtime than non-nuclear riggers because of the lack of them. There is not that many because of the qualifications that you have to go through to be one." When Mr. Spicer supervised Claimant in the 1980s, Claimant was a "normal rigger." (TR. at 49).

Mr. Spicer also related that riggers frequently move throughout the shipyard and can move from one crew to another crew. This frequent movement can result in movement from one area with a great amount of overtime to another area with lesser overtime. As a result, Mr. Spicer agreed that there was no way to know which crew Claimant would have been working on now had he remained a rigger and not been injured. (TR. at 50).

Medical Evidence

Claimant was seen by Dr. R. B. McAdam of Peninsula Neurosurgical Associates, Inc., in Hampton, Virginia, on June 18, 1993, after being referred for an independent medical evaluation by Dr. James Reid at the shipyard. Dr. McAdam noted that Claimant injured himself while lowering heavy materials. Claimant recounted his treatment and physical therapy since the time

of the accident, noting that he was seen by Dr. Reid and later by Dr. Domingo E. Cabinum in Ahoskie, North Carolina. Dr. Cabinum referred Claimant to Dr. Ira Hardy, a neurosurgeon in Greenville, North Carolina, in November 1991. Dr. Hardy found a disk protrusion at L4-5 and L5-S1. Dr. Hardy performed a myelogram and found a large epidural space and incomplete filling of the L5 nerve roots bilaterally. Claimant was treated conservatively and eventually admitted to the hospital on January 6, 1992, for a lumbar laminectomy L4-5 and L5-S1 on the right side. Dr. McAdam noted that Claimant did not improve after that treatment, and thus underwent a second laminectomy at L4-5, also performed by Dr. Hardy, in June, 1992. Claimant had physical therapy following the second surgery but stated to Dr. McAdam that he never improved and had not returned to work. (CX 9h).

Claimant presented to Dr. McAdam that he still had back pain and some vague leg pain. Claimant's neurovascular exam was negative. (CX 9h). Dr. McAdam noted that Claimant was able to squat, rise, and walk on his heels and his toes. Claimant's peripheral hip, vessel, and joint exam was also normal. Dr. McAdam wrote that "Straight leg raise to 90 degrees lying supine on the bed causes minimal back pain without leg pain." Dr. McAdam's impression was "Chronic musculoskeletal low back pain status post lumbar laminectomy X 2." Dr. McAdam opined that Claimant had 20 to 25 percent permanent partial disability in his low back. Claimant was, in his opinion, unable to perform "heavy work," including work that involved climbing ladders and working overhead. (CX 9i).

On June 21, 1993, Dr. McAdam completed a work restriction evaluation regarding Claimant's condition. Dr. McAdam noted that Claimant could intermittently engage in sitting, walking, and lifting (between 10 and 20 pounds), each for four hours per day; he could bend, squat, climb, and kneel intermittently for one hour per day each; and he could intermittently stand for up to eight hours per day. Dr. McAdam opined that Claimant should completely refrain from any activity involving twisting. Dr. McAdam provided no hand restrictions, and that Claimant could engage in simple grasping, pushing and pulling, and fine manipulation. Claimant could also reach or work above shoulder height, as well as operate foot controls and any type of motor vehicle. Claimant had no cardiac, visual, or hearing limitations. In the space labeled, "Can the individual work eight hours a day," the box for "yes" is checked. He also checked the box indicating that Claimant had reached maximum medical improvement. (CX 7).

Dr. Ira Hardy saw Claimant at the request of Employer for a neurosurgical consultation on October 30, 1995. Claimant related to Dr. Hardy that he underwent a limited laminectomy at right L4-L5 and L5-S1 on January 7, 1992, after a CT scan revealed an L5-S1 focal disk protrusion. Dr. Hardy also noted that Claimant underwent a second laminectomy on June 12, 1992, with excision of recurrent extruded disk. Dr. Hardy wrote that in December, 1992, he felt Claimant had reached maximum medical improvement, and noted that because Claimant's pain was worsened by activity, he did not believe Claimant would be able to return to work at the shipyard. Dr. Hardy noted that he was contacted by Dr. Reid on March 8, 1993, as to whether there was some light duty work that Claimant could perform. He noted that Claimant apparently returned to the shipyard and performed light duty work but that the pain in his back and right leg reoccurred. Thus, Claimant was referred back to him for re-evaluation. (CX 9k).

Upon examining Claimant, Dr. Hardy found that he had a normal lumbar curve, with some tenderness in the area of the laminectomy incisions. He noted that straight leg raises were mildly positive on the right and negative on the left. Dr. Hardy noted that he would be taking AP and lateral flexion and extension spine X-rays to ensure that Claimant's spine was stable, and if so, opined that Claimant should stay out of work for a couple of months. (CX 9*l*).

A work status form was completed by Dr. Hardy on October 30, 1995. Dr. Hardy noted that Claimant was to remain out of work until "released from my care." The form also notes that a follow up appointment was scheduled for January 10, 1996. (CX 9m).

Claimant was seen again by Dr. Hardy on January 10, 1996. Dr. Hardy noted that Claimant was still experiencing chronic back pain and discomfort in his groin area. Claimant related to Dr. Hardy that he attempted to return to work, and his symptoms reoccurred. Dr. Hardy opined that Claimant has a chronic back problem and "will not be able to return to work in the rigging department." Dr. Hardy discharged Claimant from his care at that time. (CX 9n).

Dr. Reid at the shipyard completed a "Physical Abilities Form" regarding Claimant on June 12, 1997. Dr. Reid noted that the restrictions applied to Claimant's back and that the restrictions were permanent in nature. Claimant was restricted to lifting no more than 10 pounds and carrying that weight no more than 50 feet. Claimant was permitted to climb inclined ladders and stairs to and from his job site only. Claimant was prohibited from crawling. However, he was permitted to kneel, squat, bend, stand, and twist for 1 to 2.5 hours per day. Claimant had no restrictions as to the following activities: push/pull hand/arms; simple grasp-hand; firm grasp-hand; use of vibratory tool; foot controls; and work above shoulder. In the comment section, Dr. Reid wrote, "Should do sedentary work, may occasionally walk or stand." At the bottom of the form he also noted, "Per Dr. Hardy's note of April 7, 1996." (EX 5).

Is Claimant Entitled to Permanent Partial Disability Due to a Loss of Wage-Earning Capacity Due to a Loss of Overtime?

Section 20(a) Presumption

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 614-15 (1982); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the elements of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Indus.*, 455 U.S. at 615. Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted,

the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

Claimant testified, and parties stipulate that, he was injured on November 20, 1990, and that he sustained an injury to his back arising out of and in the course of his employment. (TR. at 13; JX 1). Claimant testified that he treated with Dr. Hardy, who performed two surgeries on his back as a result of his injury. (TR. at 15). The medical records confirm this course of treatment. (CX 9k). The parties have also stipulated that Claimant's employment is subject to coverage under the Act. Therefore, upon consideration of the evidence, I find that Claimant has established a prima facie case for compensation and is entitled to the presumption of Section 20(a) that his back problems are casually related to the injury he sustained on November 20, 1990.

Rebuttal of Section 20(a) Presumption

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence that establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976); *Peterson v. General Dynamics Corp*., 25 BRBS 71, 78 (1991); *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989). Substantial evidence is relevant evidence such that a reasonable mind might accept it as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951); *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Dearing v. Director, OWCP*, 998 F.2d 1008, at *2, 27 BRBS 72, 75 (4th Cir. 1993) (unpublished) (per curiam); *Steele v. Adler*, 269 F. Supp. 376, 379 (D.D.C. 1967); *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844, 846 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and the employment. *See Am. Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 817-19 (7th Cir. 1999); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990).

Employer did not contest, either during the hearing or in its post-hearing brief, that Claimant's injury was not caused by his employment. To be sure, Employer stipulated that Claimant's injury arose out of and in the course of employment. (JX 1). Rather, Employer argues that Claimant is not entitled to compensation in the form of permanent partial disability due to a continued loss of wage-earning capacity due to a loss of overtime. Therefore, I find that the presumption of Section 20(a) is not rebutted and that Claimant's injury is compensable under the Act.

Nature and Extent of the Disability

Claimant in the instant matter seeks an award for permanent partial disability benefits for a loss of wage-earning capacity due to a loss of overtime from January 1, 2002, to the present and continuing. Permanent disability is a disability that has continued for a lengthy period of time. The date of permanency is established as of the date that the employee reaches maximum medical improvement. A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *James v. Pate Stevedoring Co*., 22 BRBS 271, 274-75 (1989). The parties have stipulated that Claimant reached maximum medical improvement on August 15, 1998. (JX 1). Therefore, Claimant is entitled to permanent disability benefits if it is found that he continues to have a loss of wage-earning capacity due to a loss of overtime.

As to the extent of Claimant's injury, the parties do not dispute that Claimant's injury is to his back. As Claimant's injury is non-scheduled, he must therefore prove that he has suffered a loss of wage-earning capacity. 33 U.S.C. §908(c)(21); s*ee also Gilchrist v. Newport News Shipbuilding & Dry Dock Co*., 135 F.3d 915, 919 (4th Cir. 1998) (quoting *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 282-83 (1980) ("Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity.").

Under Section 8(c)(21) of the Act, if a claimant's injury does not fall under the "schedule" (Section 8(c)(1)-(20)), and it is determined that the claimant is entitled to compensation, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." 33 U.S.C. §908(c)(21). Wage-earning capacity under Section 8(c)(21) of the Act is measured pursuant to Section 8(h) of the Act, which states that:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

Id. §908(h).

Therefore, in establishing entitlement to temporary partial disability benefits based on a loss of wage-earning capacity under Section 908(c)(21) of the Act, a two-part analysis is required. *Devillier v. Nat'l Steel & Shipbuilding Co*., 10 BRBS 649, 660 (1979). The first

inquiry requires an administrative law judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 794-95 (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which does fairly and reasonably represent the claimant's wage-earning capacity. *Id*. at 795. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. *Devillier*, 10 BRBS at 660.

Loss of overtime is properly considered when determining a claimant's loss of wage-earning capacity. *Brown v. Newport News Shipbuilding & Dry Dock Co*., 23 BRBS 110, 112 (1989). In order to prove partial disability in the form of loss of overtime, Claimant must show: 1) that overtime was available after his injury; 2) that his injury prevented him from being able to work overtime; and 3) that he would have worked overtime if it had been available. *Id*. at 113; *Grimes v. Exxon Co*., 14 BRBS 573, 578 (1981). This burden may be met through the claimant's credible testimony and previous work record. *Brown*, 23 BRBS at 113. In addition, it is not enough to demonstrate the loss of some overtime. Instead, Claimant must provide data and information that allows the administrative law judge to calculate the exact amount of lost overtime in order to justify an award for loss of overtime. *Butler v. Washington Metro. Area Transit Auth.*, 14 BRBS 321, 323 (1982).

Claimant makes two arguments in support of his position that he is entitled to an award of permanent partial disability benefits for the period of January 1, 2002, to the present and continuing. Claimant first argues that his loss of wage-earning capacity can be properly measured by comparing the overtime available to and worked by him from January 1, 2002, to the present with the overtime worked by comparable co-workers during that period of time. (Claimant's Brief, at 16). For comparison purposes, Claimant offers that Charles Overton, James Elam, Henry Novell, Ronnie Batten, and Mack Lassiter are comparable employees. Claimant cites to the testimony by both himself and Mr. Spicer that Messrs. Overton and Elam are riggers who performed similar work and are similar to Claimant in both training and experience. (Claimant's Brief, at 18 (citing TR. at 20-21, 24; CX 8)). Mr. Spicer also confirmed that Messrs. Novell, Batten, and Lassiter are all riggers with whom he is familiar. (Claimant's Brief, at 19 (citing TR. at 47-48, 52)).[4]

Claimant argues that the evidence demonstrates that Messrs. Overton, Elam, Novell, Batten, and Lassiter all worked significantly more overtime than Claimant from January 1, 2002, to the present and continuing. Claimant calculates that these five employees worked, on average, 635.78 hours of overtime during 2002; 551.44 hours of overtime during 2003; and 6.42 hours of overtime per week in 2004. (Claimant's Brief, at 19-20). Claimant asserts that, while the amount of overtime worked by each of these employees individually varies, it is clear that they worked significantly more overtime than Claimant, who worked a total of 122.4 hours of overtime in 2002; 100 hours of overtime in 2003; and 1.94 hours of overtime per week in 2004 (through March 24, 2004). (Claimant's Brief, at 20).

[4] Claimant notes that, in response to his request for records of comparable employees, Employer provided the overtime records of Messrs. Overton and Elam, as well as those of Algenon Purdie and Tilden Purdie. To this extent, Claimant argues that Employer should be estopped from arguing that these employees are not comparable to Claimant for the purposes of overtime analysis. (Claimant's Brief, at 19 fn.16).

Claimant cites Mr. Spicer's testimony that foremen attempted to assign overtime evenly between the workers. (Claimant's Brief, at 20 (citing TR. at 44, 50-51, 54)). He also offers that the records in evidence confirm the general availability of overtime to full duty riggers. (Claimant's Brief, at 21). Claimant points out that Employer has offered no evidence to support an argument that Claimant would not have remained a rigger had his injury not occurred. Therefore, Claimant argues that a comparison between Claimant's records and those set forth as comparable is proper. (Claimant's Brief, at 21).

Based upon this argument, Claimant asserts that he is entitled to overtime according to the following calculations. For the year 2002, Claimant claims a loss of 513.38 overtime hours (635.78 average overtime hours of the comparable employees minus Claimant's 122.4 hours of actual overtime worked). Claimant asserts that his hourly rate the time of injury was $10.98 per hour, with an overtime rate (one and one-half times his normal hourly rate) of $16.47. According to Claimant, 513.38 hours multiplied by the $16.47 hourly (overtime) rate computes to $8,455.37; when divided by 52 weeks equals a weekly loss of $162.60. Two-thirds of this amount equals $108.40. For the year 2003, performing the same calculations, Claimant asserts that he is entitled to a weekly loss of overtime of $95.33 per week. Finally, for 2004, performing the same calculations again, Claimant asserts that he is entitled to compensation at a rate of $49.19 per week. (Claimant's Brief, at 21-22).

Claimant's second argument for entitlement to permanent partial disability benefits focuses upon a strict comparison of his pre-injury and post-injury wage records. (Claimant's Brief, at 22). Claimant points to his wage records, which reflect that he worked 96 overtime hours in 1990 prior to his injury on November 20, 1990, and states that, when extrapolated, calculates to 107.84 hours for 1990, or an average of 2.07 hours per week. Claimant concedes this number is less than the amount of overtime he worked post-injury in 2002, when he worked 122.4 hours, and if this analysis was used, he would not be entitled to benefits for the year 2002. However, Claimant argues that the same strict comparison also reveals that Claimant worked only 100 hours of overtime in 2003; thus, Claimant suffered a loss of overtime that year when pre-injury and post-injury wage records are calculated. (Claimant's Brief, at 23). As for 2004, Claimant asserts that he worked an average of 1.94 hours of overtime per week. Given that this is below the 1990 average of 2.07 overtime hours per week, Claimant argues that he continues to suffer a loss of wage-earning capacity due to a loss of overtime in 2004 as well. (Claimant's Brief, at 24).

Along these lines, Claimant argues that he is also entitled to ongoing permanent partial disability remains the same if a multi-year pre-injury average overtime calculation is compared to a multi-year post-injury average overtime calculation. Claimant offers that he worked 124.2 overtime hours in 1988; 109.4 overtime hours in 1989; and 96 overtime hours until the time of his injury in 1990. Extrapolating the overtime worked in 1990 and averaging these three years (1988, 1989, and 1990) computes to average annual overtime of 113.81 hours. Post-injury, Claimant offers that he worked 122.4 overtime hours in 2002; 100 in 2003; and, based on his work record to date, would work 100.88 overtime hours in 2004; resulting in an annual average of 107.76 overtime hours. Claimant concedes that these calculations result in only a relatively small loss of 0.12 overtime hours per week. According to Claimant, at the overtime hourly rate

of $16.47, this figure would translate into a monetary loss of $1.98 per week and a compensation rate of $1.32 per week. (Claimant's Brief, at 24-25).

Claimant sets forth an additional argument that, even if the court finds that he is not entitled to benefits from January 1, 2002, to the present and continuing for a loss of wage-earning capacity due to a loss of overtime, he is still entitled to a de minimis award. In support of this argument, Claimant asserts that his permanent restrictions make him permanently unable to return to his pre-injury work and as a result, he has a continuing economic loss. Therefore, he contends that, in light of that loss, it is likely or at least possible that he will suffer a further economic loss, and thus, he is entitled to a de minimis award. (Claimant's Brief, at 25-26). Claimant argues that:

> [T]o the extent that the Employer sought modification of the prior Order in this case specifically based on an increase in overtime availability to Mr. Matthews, and to the extent benefits are not awarded on a continuing basis in this case based on an increase wage-earning capacity as measured by an increase in overtime worked, Mr. Matthews should likewise be able to pursue additional benefits in the future based on the unavailability or decrease in the availability of the overtime in the post-injury, limited duty position. . . . to find otherwise would simply be inconsistent with any relief awarded to the Employer or any denial of ongoing benefits to Mr. Matthews.

(Claimant's Brief, at 26-27).

Employer argues that Claimant no longer suffers a loss of wage-earning capacity because his injury has not prevented him from working overtime since January 1, 2002. According to Employer, there is no evidence that Claimant *has* been prevented from working overtime since the beginning of 2002; that both Claimant and Mr. Spicer testified that Claimant has been working overtime; and that Claimant has no restrictions that prohibit him from working overtime. (Employer's Brief, at 12). Employer asserts that Claimant works overtime when it is available to him and that his injury no longer prevents him from working overtime. (Employer's Brief, at 13).

Employer further argues that Claimant's attempt to show a loss of overtime based upon the overtime worked by co-workers is only a valid argument if the amount of overtime worked by the co-workers would have been available to Claimant. (Employer's Brief, at 13 (citing *Butler v. Washington Metro. Area Transit Auth.*, 14 BRBS 321, 323 (1982))). Employer argues that *Butler* stands for the proposition that "the amount of overtime worked by one employee is probative of the amount of overtime available to another employee only when the factors determining the availability of that overtime are comparable or consistent." (Employer's Brief, at 13). Employer argues that Claimant does not establish that prerequisite in the instant matter because none of the co-workers offered as comparable by Claimant worked on the same crew with him prior to his injury. (Employer's Brief, at 13-14).

Employer also contends that the evidence shows that riggers work throughout the shipyard, that those riggers perform different jobs in different areas of the shipyard, and thus

may work different amounts of overtime. Along these lines, Employer asserts that because Claimant does not know the people he cites as comparable (namely, Tilden Purdie, Algenon Purdie, and Mack Lassiter), and only knew of Henry Novell and Ronnie Batten, Claimant has not established that he continues to lose overtime and has in fact failed to address the real issue of whether his injury has prevented him from working overtime since January 1, 2002. (Employer's Brief, at 14).

Instead, Employer maintains that, since January 1, 2002, Claimant has worked at least an equivalent amount of overtime to that which he worked prior to his injury. To this extent, Employer points out that Claimant's temporary partial compensation rate was equal to approximately two hours of overtime being lost per week, and that Claimant is currently working over two hours of overtime per week. Therefore, Employer concludes that Claimant has not been prevented from working overtime since January 1, 2002, and may in fact be working more overtime per week, on average, than he was at the time of his injury in 1990. (Employer's Brief, at 15).

Both Claimant and Mr. Spicer credibly testified that Claimant's work restrictions prevented him, after his injury, from returning to his pre-injury employer as a rigger. (TR. at 18, 43). Further, both parties stipulated at the hearing that claimant was unable to return to his pre-injury employment. (TR. at 55).

Claimant also testified that, prior to his injury, he worked overtime when it was made available to him. (TR. at 18). When Claimant was assigned to the toolroom following his injury, he worked some overtime in that position beginning in 2002. He also testified that he worked overtime when it was made available to him when he worked in the toolroom. He continued to work overtime in 2002 and 2003. (TR. at 19, 30). Claimant did not work overtime when he was assigned to the hose shop because none was available. (TR. at 30). Claimant has worked overtime since he began driving a forklift and had worked approximately 23 hours of overtime in 2004 at the time of the hearing. (TR. at 30, 34-35). Claimant's overtime is not confined to working with his assigned crew. (TR. at 31, 34).

Mr. Spicer also gave testimony as to overtime at the shipyard. According to Mr. Spicer, the foremen under him assign overtime to the employees dependent upon the type and number of workers needed by the various trades. (TR. at 44, 50). The foremen try, to the extent possible, to divide the overtime evenly among the workers. (TR. at 54).

Claimant testified credibly that he worked overtime when it was made available to him, and Employer has offered no evidence to the contrary. Claimant also credibly testified, and it is uncontroverted, that had overtime been made available to him following his injury, he would have worked that overtime. Claimant's work records substantiate his statements regarding overtime he worked. For example, prior to his injury in 1990, Claimant worked 96 hours of overtime. He also worked 109.4 hours of overtime in 1989, and 124.2 hours of overtime in 1988. (CX 1). In 2002, Claimant worked 122.4 hours of overtime; he also worked 100 hours of overtime in 2003, and as of the date of the hearing, had worked 23 hours of overtime in 2004. (CX 1).

Thus, the remaining determination is whether Claimant has shown that his injury prevented him from being able to work overtime. Along these lines, the overtime worked by the comparable workers offered by Claimant must be examined and compared with Claimant's own overtime history. Both parties have submitted several documents into evidence regarding Claimant's history of overtime work as well as that of some of his co-workers. The following chart represents a compilation of the evidence submitted by the parties with regard to the overtime worked by Claimant and his co-workers. All of the individuals listed, with the exception of Zolly Outlaw, have been offered by Claimant as examples of comparable workers.

Worker	2002	2003	2004
Claimant	122.4	100	23 (as of March 24, 2004)
Charles Overton	501.6	533.1	93.8 (as of March 3, 2004)
Tilden Purdie	192.6	325.7	34.0 (as of March 3, 2004)
James Elam	378.3	180.5	18.5 (as of March 3, 2004)
Algenon Purdie	1065.5	431.2	117 (as of March 3, 2004)
Henry Novell	240.5	259	139 (as of June 22, 2004)
Ronnie Batten	1680.0	1270.0	156.0 (as of June 22, 2004)
Mack Lassiter	378.5	514.1	185.5 (as of June 22, 2004)
Zolly Outlaw	0.0	16.0	0.0 (as of February 4, 2004)

(CX 1; CX 8; CX 9; EX 6).

One issue that is apparent from comparing the overtime worked by the comparable workers offered by Claimant is that the overtime worked by these individuals is not comparable even among themselves, even without comparing them to the time worked by Claimant. For example, in 2002, the overtime worked ranges anywhere from 192.6 hours (overtime worked by Tilden Purdie) to 1,680 hours (overtime worked by Ronnie Batten). (CX 8). Likewise, in 2003, the overtime worked ranges from 180.5 hours (James Elam) to 1,270 hours (Ronnie Batten). To be sure, Mr. Spicer testified that Claimant was a non-nuclear rigger whereas Ronnie Batten was a qualified nuclear rigger, a category of rigger that Mr. Spicer testified usually worked more overtime because they were fewer in number. He also testified that James Elam is a non-nuclear rigger. Mr. Spicer did not know the qualifications of Tilden Purdie, Algenon Purdie, or Henry Novell. (TR. at 47-48, 52-53). Mr. Spicer further testified that Mr. Lassiter was a non-nuclear rigger. Finally, Mr. Spicer testified, and no evidence to the contrary has been offered, that Zolly Outlaw is currently under work restrictions and is working in the main tool room. (TR. at 48, 52). Claimant testified that Mr. Overton was hired around the same time he was hired, and he considered Mr. Overton to be similar to him in training and experience. (TR. at 19-20).

A comparison with the co-workers offered by Claimant cannot be fairly and accurately accomplished if Claimant is compared with workers who have different qualifications. Therefore, Mr. Batten cannot be considered as a comparable worker. Likewise, I will not consider Messrs. Purdie or Mr. Novell as comparable because no evidence has been offered as to their qualifications. Finally, I will not consider Mr. Outlaw as comparable due to Mr. Spicer's uncontradicted testimony that he is currently on restrictions. Therefore, I am left with Charles Overton, James Elam, and Mack Lassiter to compare to Claimant to determine whether Claimant has a loss of wage-earning capacity due to a loss of overtime.

However, even when looking only at these three individuals and comparing their overtime with that worked by Claimant, another issue arises. Even among these three individuals, the overtime worked by them in 2002, 2003, and 2004 varies significantly, and no explanation is offered for the variation, other than Claimant's acknowledgement of the variation in his post-hearing brief. This variation calls into question the testimony given by Mr. Spicer that the foremen attempt to divide the overtime evenly among the workers. Notably, Mr. Overton worked approximately 125 hours more overtime than Messrs. Elam and Lassiter in 2002. In 2003, both Messrs. Lassiter and Overton worked more than twice the amount of overtime as that worked by Mr. Elam. Finally, in 2004, as of March 3, 2004, Mr. Overton had worked four times as much overtime as Mr. Elam. Extrapolating the overtime amounts provided yields that Mr. Overton worked an average of 10.42 hours of overtime per week as of March 3, 2004; Mr. Elam had worked an average of 2.05 hours of overtime per week as of that same date. Mr. Lassiter worked an average of 7.42 hours of overtime per week as of June 22, 2004. If these individuals continued to work overtime at their respective paces, Mr. Overton would work 541.84 overtime hours; Mr. Elam would work 106.6 overtime hours; and Mr. Lassiter would work 385.84 overtime hours during the course of 2004. Obviously these numbers also vary significantly.

Based upon these observations, I find that Claimant's first argument, that he is entitled to permanent partial disability benefits due to a loss of wage-earning capacity due to a loss of overtime based upon a comparison of comparable workers, must fail. Claimant's loss of overtime cannot be measured by comparing the overtime he has worked since January 1, 2002, to the present with the overtime worked by his co-workers during that same time period. Claimant's observation that these individuals clearly worked more overtime during that time period than he did is duly noted. However, precedent clearly dictates that the data provided must allow the administrative law judge to calculate the exact amount of overtime lost. That calculation cannot be accomplished based upon the purported comparable employees offered by Claimant.

Therefore, I will now consider Claimant's second argument regarding entitlement to permanent partial disability benefits. Claimant argues that a strict comparison of his pre-injury and post-injury wage records demonstrates a loss of wage-earning capacity due to a loss of overtime. Employer, on the other hand, argues that Claimant has worked as least as much overtime per week post-injury as he did pre-injury and therefore is not entitled to permanent partial disability benefits.

Prior to his injury in 1990, Claimant worked 96 hours of overtime, or an average of 2.07 hours per week. He also worked 109.4 hours of overtime in 1989 (2.10 hours per week), and 124.2 hours of overtime in 1988 (2.38 hours per week). (CX 1). In 2002, Claimant worked 122.4 hours of overtime (2.35 hours per week); he also worked 100 hours of overtime in 2003 (1.92 hours per week), and as of the date of the hearing, had worked 23 hours of overtime in 2004, or an average of 1.94 overtime hours per week. (CX 1).

Based upon the evidence, I find that Claimant is working virtually the same amount of overtime hours post-injury as he did in his pre-injury position. As can be seen from the average number of hours of overtime worked per week, there is very little if any difference in the overtime hours worked. In fact, in 2002, Claimant worked more overtime hours than he did in 1989, and based upon the extrapolation, worked more hours in 2002 than he would have worked in 1990. He worked only 1.5 hours less overtime for the entire year in 2002 than he did in 1988, two years prior to his injury. To be sure, he worked less overtime in 2003, and to date, has worked less overtime in 2004. However, when a closer examination of the hours per week is conducted, a more accurate representation of Claimant's overtime hours is revealed. Therefore, I find that Claimant has not met his burden of proving that his injury has prevented him from working overtime.

Finally, I will address Claimant's third argument that, even if the court finds he is not entitled to benefits from January 1, 2002, and continuing, that he is entitled to a de minimis award because it is likely or at least possible that he will suffer a further economic loss.

When a claimant has proven a medical disability that presently causes no loss of wage-earning capacity, but has a reasonable expectation that a loss in wage-earning capacity will occur in the future, a de minimis award is appropriate. *Metro. Stevedore Co. v. Rambo*, [*Rambo II*], 521 U.S. 121, 135, 138 (1997). The purpose of a de minimis award is to provide a continuing nominal award to perpetuate the ability of an injured claimant to seek a Section 22 modification of a current order if there is a future economic harm. *Id*. at 129, 135. The Fourth Circuit does not favor de minimis awards. In *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), the court held that a de minimis award is inappropriate in those cases where a claimant has steady continuous post-injury employment. Also, the court held that de minimis awards are appropriate only where there is sufficient evidence to conclude that there is a likelihood of future economic harm and that the degree of harm cannot be ascertained at the time of the hearing. *Id.* at 1234 n.9.

Sufficient evidence is not present here. In the instant matter, the only basis offered for Claimant's argument is that it is "likely, or at the very least possible" that Claimant will have a future economic loss. (Claimant's Brief, at 26). Claimant has offered no evidence that Employer may reduce his amount of overtime or any medical evidence to show that he may be unable to work overtime in the future due to, for example, any additional surgeries. Any loss of future wages is speculative at best. Therefore, Claimant's request for a de minimis award is denied.

Order

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, is hereby ordered to pay to Claimant, Willie L. Matthews, permanent partial disability from August 15, 1998, through December 31, 2001, inclusive, at the compensation rate of $21.06 per week;

2. Claimant's request for permanent partial disability benefits from January 1, 2002, to the present and continuing is Denied;

3. Claimant's request for a de minimis award is Denied;

4. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

5. Employer shall receive credit for any compensation already paid;

6. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

7. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD E. HUDDLESTON
Administrative Law Judge